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No. 271

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1926

BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

against

VERNON PHILLIPS, an infant, by VERNON PHILLIPS, his Guardian *ad Litem*

BRIEF FOR THE RESPONDENT

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

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BALTIMORE STEAMSHIP COMPANY and UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, *Petitioners,*

v.

VERNON PHILLIPS, an infant, by VERNON PHILLIPS, his guardian *ad litem.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

Opinion.

The opinion of the Circuit Court of Appeals (R., 117) is reported in 9 F. (2nd) 902.

The Question.

The petitioners have raised the question, whether a decree in admiralty for maintenance and cure is a bar to a later action at law for damages for personal injuries caused by the negligence of fellow servants. The theory of liability upon which the plaintiff recovered a judgment was not before the court in the admiralty proceeding and could not have been litigated under the pleadings therein.

Statement of the Case.

This case has nothing to do with the Federal Employees' Compensation Act. The plaintiff was not a Federal employee. He was a member of the crew of the *West Cape*, a cargo vessel operated by the defendants (R., 41). At the time he signed articles he was eighteen years old and was going to school and working in vacation (R., 42). Although he had never been to sea before, he was put down on the articles as an ablebodied seaman (R., 42). The ship left Baltimore in May, 1921, carrying grain and coal for British ports. Number 1 hold and Number 5 hold were fitted with shifting boards and after the grain had been discharged, the shifting boards were left in, and water taken into the holds for ballast (R., 43, 69). On the voyage home, the rolling of the water ballast knocked down and splintered the shifting boards in these holds. On Sunday, July 24, 1921, when the ship was within a day or two of her home port, the deck crew was set to work taking out the broken lumber from Number 1 hold (R., 70). One section of the hatch was taken off and one strongback was taken out at the main deck and one or two at the 'tween deck hatch; the rest of the strongbacks were allowed to remain in (R., 72). The dunnage was hoisted by a winch on the port side of Number 1 hatch, the second officer acting as winchman (R., 71). After the hoisting had commenced the plaintiff was ordered into Number 1 hold to clean the bilges (R., 44, 45). While he was scooping the grain out of the starboard bilges, the wire fall which had been led into the forward part of Number 1 hold, fouled a strongback, and as the winchman continued to hoist away, the strong-

back was lifted out of its sockets and thrown into the hold upon the plaintiff (R., 46, 73, 74). His left leg was mangled so badly that it was later amputated above the knee (R., 47).

Action was brought in the Supreme Court of the State of New York, Nassau County, and removed to the United States District Court for the Eastern District of New York where the plaintiff recovered a verdict for Forty Thousand Dollars (R., 90). The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Second Circuit (R., 122).

Before the commencement of this action, libel was filed in the United States District Court for the District of Maryland, entitled "Vernon L. Phillips, Jr., by Vernon L. Phillips, his father and next friend *against* the United States of America, the United States Shipping Board Emergency Fleet Corporation and the Baltimore Steamship Company, a body corporate" (R., 101). The proctor for libellant was E. Ridgley Simpson, who was then the attorney for the Baltimore Steamship Company, one of the respondents (R., 102, 22, 23). The amended libel, filed after exceptions to the libel, particularized libellant's claim and expressly specified that his claim for negligence was directed solely against the United States of America in failing to provide a seaworthy ship (R., 103). The amended libel reads as follows:

> "Libellant alleges that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of proper design and sufficient strength to support the strongback when one end of it was negligently

> knocked out of place by a load of dunnage being hoisted from the hold; further the officers of the Steamship *West Cape* were incompetent; further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience. And libellant claims that in the event that negligence is not established for wages, maintenance and cure" (R., 103).

The cause was heard and resulted in a decree for maintenance and cure for Five Hundred Dollars and the attorneys immediately caused the decree to be marked "Satisfied" (R., 99, 100).

Thereafter action was commenced under the Merchant Marine Act to recover damages for personal injuries; therein the plaintiff alleged and proved that his injuries were due to the negligence of his fellow servants. The United States of America was not a party to this lawsuit (R., 2, 3). Therein the plaintiff recovered a judgment which has been affirmed by the Circuit Court of Appeals for the Second Circuit upon the authority of *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434 (R., 117). This is the situation of which the petitioners complain.

Summary of the Argument.

1. One who has unsuccessfully pursued an erroneous or non-existent cause of action, is not thereby precluded from a recovery upon the cause of action brought upon a totally distinct theory of liability; and this is true even in cases where the parties are the same and where similar facts have been established in both proceedings.

The plea of *res judicata* certainly cannot be raised

where the parties are different, where the pleadings are substantially different and where the judgments obtained are in pursuance of distinct and concurrent rights.

2. The law of this case has been settled by the Supreme Court (*Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434).

ARGUMENT.

I.

The admiralty decree was not an adjudication of all the plaintiff's rights arising from his injury and it is not a bar to the present action.

The gist of petitioner's argument is that a cause of action may not be split into several parts and portions of it tried at different times. But this is exactly what Phillips has not done. It might be said with a view to precise language that a man may have but one cause of action for damages for personal injuries. But it must also be admitted that he might have several theories of liability. If he chose an incorrect theory and was defeated, as of course he must be, he would not be estopped thereby from a recovery on a correct theory of liability.

An analysis of the proceeding shows that Phillips did not split up a cause of action. It must be admitted that he had two causes of action; one for damages for personal injuries and another for maintenance and cure. He received a decree for maintenance and cure in admiralty. But this was not a bar to the second cause of action for damages for personal injuries received through the negligence of fellow servants.

In *Rolph Navigation and Coal Co.* v. *Kohilas*, 299 Fed. 52, a libel was filed for damages for beatings sustained by Kohilas, a seaman at the hands of the mate of the *Rolph*. The respondents pleaded and proved that Kohilas had recovered his wages and maintenance in another proceeding, and asserted that the prior decree was a bar to the instant action.

HUNT, Circuit Judge, on page 54, said:

> "The evidence is in harmony with the conclusion of the District Judge, and as Kohilas has recovered in another proceeding for wages and maintenance, and makes no claim herein for expenses and cure, the principal question presented is whether the vessel can be held liable to an indemnity for injuries in consequence of the hiring and retention of Hansen as mate."

And on page 55:

> "Nor should Kohilas be precluded from recovering because of the fact that in another proceeding for wages and maintenance he recovered. His right to wages, maintenance and expenses of cure existed under any and all circumstances, unless there was wilful misconduct; but his right to recover an indemnity is a separate matter."

The most that petitioners can argue is that the libellant mingled his claim for maintenance with an improper and incorrect theory of liability for damages for personal injuries. He did not establish the facts necessary to satisfy the theory and his libel as to indemnity was therefore dismissed. If that part of his proceeding amounted to anything, it was at most a pursuit of a non-existent cause

of action. But the fact that he has pursued the supposed remedy until the Court judged that it had never existed, would not preclude the subsequent pursuit of a remedy for relief to which in law he is entitled.

Again we find that the Baltimore and New York suits differ in many respects. The same issues were not raised by the pleadings. The libel did not charge the respondents with the negligence of the officers and crew. Moreover, the libel was amended; and under the rules of pleading, the amended libel superseded the original libel or it limited the libel to a specific and particular claim.

In the amended libel we find the only claim for indemnity is based upon a charge of negligence against the United States of America in failing to provide a cleat or socket of proper design (R., 103). It is true that the amended libel contains a further allegation of incompetence on the part of the officers and of a special duty owed to the libellant because of his youth and inexperience; but these statements are meaningless conclusions. And these were the issues that were tried in the District Court of Maryland between the libellant and the respondent United States of America. The opinion of Judge Rose (*Vernon L. Phillips, Jr.* v. *United States of America*, 286 Fed. 631) plainly shows what was pleaded and proved:

> "The libellant charges negligence on the owners of the ship in that the cleat or socket supporting the strongback was not of proper design or sufficient strength, that the officers of the steamship were incompetent and the respondent owed a special duty to the libellant because of his youth and inexperience."

These allegations were made and attempted to be proved against the United States of America.

In the action commenced in the Supreme Court of the State of New York and removed by the defendants to the United States District Court, only the negligence of fellow servants was pleaded and proved; and the United States of America was not a party to this lawsuit (R., 2).

The libel resulted in a decree for maintenance and cure; and that was the only issue tried in that proceeding (R., 100).

In the action at law, the plaintiff made no allegations of incompetency of the officers or unseaworthiness of the ship. He did not repeat in his complaint any of the allegations of the libel. He alleged and proved that his injuries were due to the negligence of his fellow servants, and he recovered a verdict for damages for personal injuries due to such negligence. The facts alleged and proved were totally different. The theories of liability were different and the causes of action were totally distinct. Therefore, the admiralty decree for maintenance and cure, a right distinct from any right of action for damages for negligence, was not a bar to the second cause of action for damages for negligence of fellow servants.

The petitioners have cited cases wherein it has been held that plaintiff may not split up his demand and prosecute it by piecemeal; or that he may not vary his description of the same act of negligence. There can hardly be a quarrel with these principles; but they have no application to the instant case.

In *Columb* v. *Webster Manufacturing Co.* (C. C. A. 1st), 84 Fed. 592, the plaintiff was injured by a defective trestle.

In his first action he alleged an unsafe place to work, and in his second action, he added to this allegation the incompetence of fellow servants. But his cause of action arose from a defective trestle, and, of course, he could not be allowed to vary it by changing his descriptions of the same act of negligence. This case, which is now petitioners' main reliance, was cited by the defendant-in-error in *Troxell* v. *Del. L. & W. R. R. Co.*, 227 U. S. 434. It was under the consideration of the Supreme Court then and was distinguished, as it is distinguishable here.

In *Miller* v. *Spokane International Ry. Co.* (C. C. A., 9th), 293 Fed. 748, two actions were brought. In one it was alleged that the apron was not rough and in the other that the apron was too short. The negligence, if any, consisted in a defective apron and the plaintiff was only varying his descriptions of the defective apparatus. That case seems to have been decided upon the authority of *Stark* v. *Starr*, 94 U. S. 477, and Stark's case must have been considered by the Supreme Court in Troxell's case. For the purpose of the instant case, it may properly be said that these decisions have been overruled by the supreme tribunal.

In the case at bar, even if it were admitted for the purpose of the argument that the parties were the same as in the admiralty proceeding, yet it is apparent that an unseaworthy ship is certainly different from a negligent servant. They are totally distinct matters. An action for injuries due to a defective cleat or socket (which makes a ship unseaworthy) must proceed upon a theory of liability different from an action to recover damages for injuries caused by the negligence of fellow servants. They

are really different causes of action. A man may have one or the other of them; he may have neither of them; he might possibly have both of them. If he has but one of them, and pursues the other which he has not, he is not thereby estopped from prosecuting the cause of action which he really has. And this is because he has pursued a remedy which did not exist, and he has tried to enforce a nonexistent cause of action. His situation is entirely different from the man who has tried to recover because of his successive claims that the apparatus or appliance was too rough or too smooth or too long or too short or too hot or too cold.

The other cases cited by the petitioners are likewise distinguishable.

Chicago, Rock Island & Pacific R. R. v. *Schendel* (270 U. S. 611) does not aid the petitioners. That decision reaffirms the principle laid down in Troxell's case. Mr. Justice SUTHERLAND, on page 621, said:

> "It remains only to consider the bearing of the Troxell case, *supra,* upon this point. Mrs. Troxell, the widow of a deceased employee, sued the railroad company under a State Statute, for the benefit of herself and minor children, to recover for the death of her husband, resulting from a negligent failure to provide safe instrumentalities. There was a judgment against her. She then brought suit under the Federal Employers Liability Act as Administratrix, averring the negligence of a fellow servant, a ground of recovery which was not available to her in the action under the State Statute. It was held, following the general rule, that the cause of action in the two cases being different, and the issue determined in the first not being involved in the second, there was no estoppel."

It has certainly been laid down in both these cases that an action to recover damages resulting from a negligent failure to provide safe instrumentalities is a totally different cause of action from a suit to recover damages due to the negligence of a fellow servant.

And it has been uniformly ruled that a prior judgment can never be a bar as to matters not within the issues.

In *Griffen* v. *Keese*, 187 N. Y. 454, Judge WERNER on page 464, said:

> "It has been sometimes stated to be the general rule that a judgment is conclusive not only upon the question actually contested and determined, but upon all matters which might have been litigated and decided in the same suit. This is doubtless true of all matters properly belonging to the subject of the controversy and within the scope of the issues. But that is not the rule when the second suit, although between the same parties, is on a different cause of action. In such a case the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein. (*Cromwell* v. *Sac Co.*, 94 U. S. 351.)"

And in Phillips' lawsuit the matters in controversy were certainly not within the scope of the issues in the admiralty proceeding. The matters in the lawsuit could never have been litigated in the former proceeding because these questions were not at issue therein. They were not pleaded. They never could have been brought within the scope of the issues framed in the libel or in the amended libel. And never having been at issue, and

never having been litigated, a prior judgment even if between the same parties could not be a bar.

In *Shepard Co.* v. *Taylor Publishing Co.*, 198 App. Div. 638, the defendant Publishing Co. executed a chattel mortgage covering all its property to the defendant Shuart. That mortgage was foreclosed, the property bid in by the mortgagee, and leased to Taylor personally. An action was brought by the plaintiff against the defendants, assailing the validity of the mortgage and its foreclosure upon the charge of common law fraud. The plaintiff was unsuccessful. A second action was brought under Section 66 of the Stock Corporation Law, to secure a judgment declaring void the same chattel mortgage. LAMBERT, J., on page 641, said:

> "The trial court has reasoned that the purpose of the former action and the purpose of this action are identical and that the parties are the same; that the same evidence introduced in the former action was introduced in this action and that, therefore, the issue here was or could have been litigated in the former action and hence that the former adjudication was a bar to this action.
>
> "That the parties are identical and that the ultimate effect of success by the plaintiff in the two actions would be the setting aside of this chattel mortgage and the foreclosure thereof cannot be disputed. However the two actions differ in their issues.
>
> "The former action sought to establish common law fraud. In it, it was essential that the mortgagee should have participated in or had knowledge of the fraud sought to be thereby consummated.
>
> "In this action, common law fraud is not asserted and is not essential to recovery. Section

66 of the Stock Corporation Law declares: 'No conveyance, assignment or transfer of any property of any such corporation * * * nor any * * * lien created or security given by it * * * when the corporation is insolvent or its insolvency is imminent with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid * * *. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void * * *.'

"It is apparent that this statute might be violated under circumstances which would preclude recovery upon the same facts in an action for common law fraud. The common law form of action requires as an essential, scienter on the part of the transferee. It was definitely established in the former action that Mrs. Shuart did not know of such insolvency on the part of the publishing company, and that she acted in good faith so far as she was concerned. That conclusion necessarily precluded judgment for the plaintiff in the first action; but it does not preclude recovery upon the cause of action now invoked. Scienter is not a necessary element in an action predicated upon the statute. The statute declares a sequence of events to work illegality in the transaction and guilty knowledge is not one of its requirements.

"We have, therefore, an instance where a second cause of action differs materially and essentially from the one previously invoked. A case is presented where the same facts lead to judgment for the defendant in the one case and for the plaintiff in the other.

"Under such circumstances, the judgment in the first action is not and cannot be *res adjudicata* in the second."

II.

Troxell v. Delaware, Lackawanna & Western Railroad Co., 227 U. S. 434, is the law of this case.

In *Troxell* v. *Del., L. & W. R. Co.*, 227 U. S. 434, the action was brought in the Circuit Court for the Eastern District of Pennsylvania under the Federal Employers Liability Act by Lizzie M. Troxell, Administratrix of Joseph D. Troxell, against Delaware, Lackawanna and Western Railroad Co. to recover damages for wrongful death. A verdict was rendered by the District Court in favor of the plaintiff, and reversed by the Circuit Court of Appeals, Third Circuit, and brought to the Supreme Court on writ of error.

The decedent was a fireman in the employ of the defendant. He was killed in a collision between two trains. The day before his death some of the employees of the defendant had shifted a number of gondola cars upon a siding. At this point there was a down grade to the west, and on the day following the shifting of the cars, they started in motion and ran on a track upon which the decedent was driving an eastbound train. He was killed in the collision. The plaintiff brought a prior action against the defendant, stating that the decedent was a fireman in Interstate Commerce and because of the negligence of the defendant in failing to keep its devices and apparatus in good order and condition, the collision occurred. She recovered a verdict which was reversed by the Circuit Court of Appeals. Thereafter she began the present action under the Federal Employers Liability Act. The plaintiff again recovered a verdict and the Circuit

Court of Appeals reversed the judgment, holding that the first action was a bar. The record shows that on the first trial the District Judge held that the Federal Act should not be considered in determining the case, and that it was brought under the Statutes of the State of Pennsylvania. In such an action there could be no recovery because of the negligence of the fellow workmen of Troxell. In the first action, the Court held that no question of the negligence of fellow servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent cars from running down the grade in the manner they had, if left unbraked. The Circuit Court of Appeals stated that the case might be brought under the State Act, notwithstanding the Federal Employers Liability Act, and concluded to reverse the judgment. The second action was brought under the Federal Employers Liability Act, under which there might be a recovery for the negligence of the fellow servants of the decedent, and the District Court held that the former case had adjudicated matters as to defects in the cars, engines and rails, and submitted to the jury only the question of the negligence of fellow servants. The plaintiff recovered a verdict which was reversed by the Circuit Court of Appeals on the grounds that the judgment in the first case was a bar; because an action of this kind for injury to one engaged in Interstate Commerce could only be maintained under the Federal Act, and in the second action the plaintiff was merely offering to prove facts that might have been proved on the first trial. On writ of error to the Supreme Court the judgment of the Circuit Court of Appeals was

reversed, Mr. Justice DAY delivering the opinion. On page 412, he said:

> "We think it is apparent from what we have said that the first case was prosecuted and tried upon the theory that it involved a cause of action under the State Law of Pennsylvania. It was so submitted to the jury and they were told that they were not to consider the Federal Law, but recovery should be based upon the right under the State Act. If the Circuit Court of Appeals was right in its second decision, that no action could have been maintained under the State Law in view of the Employers Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court judged that it had never existed, would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled.
>
> "Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the State Law if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal Statute. Under the Pennsylvania Law, there could be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania Statute was

> not involved in the second action, and the plaintiff's right to recover because of the injury by the negligence of the fellow servants was not involved in or concluded by the first suit."

Troxell's case and the instant case present an exact parallel.

1. Pursuit of a non-existent remedy does not make the matter *res judicata* when the existent remedy is pursued. This is applicable to both cases. Mrs. Troxell might have brought her first action under the Federal Employees' Act. What she might have done in the first action was not before the court in the second suit. Petitioner says that Phillips might have brought his second cause of action in Baltimore. Whether he might or not, is not the question before the court now.

2. The plaintiff was not estopped by the judgment in the first suit as to matters not tried because not admissible therein. This principle is applicable to the instant case because the negligence proven in the second suit was not pleaded in the first suit and so was not an admissible issue.

3. There was a difference in parties between the widow in her own right, and the widow as administratrix. But Troxell's case was not decided upon that ground. There is a difference in parties in the instant case. In the first proceeding the United States was charged with a breach of duty in furnishing an unseaworthy ship. In the second action, the United States was not a party.

We find in the concluding pages of petitioner's brief in support of the petition for writ of certiorari an excellent

analysis of the decision in Troxell's case (Brief in support of petition, p. 25). It would perhaps have been more accurate had petitioner's counsel stated that the case was not decided upon a difference in parties. But in the attempt to distinguish Phillips' case from Troxell's case, the argument has wandered from the path of logic into the fields of sophistry. This analysis has been omitted from the brief for the petitioners. We feel that it should be supplied, because it compels the conclusion that the cases are identical. If the analysis of Troxell's case contained in the brief in support of the petition for the writ is a correct one, then this judgment should be affirmed.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

EDGAR J. TREACY,
Solicitor for Respondent.

March, 1927.